No. 88-1155

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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February 28, 1989

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Respondents.

RESPONSE TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

This action originated out of insurance insolvency proceedings instituted against United Equity Life Insurance Company ("United Equity") by Oklahoma Insurance Commissioner Gerald Grimes ("Commissioner") in the Oklahoma District Court of Oklahoma County pursuant to the Uniform Insurer Liquidation Act (36 O.S. §1901 et seq., hereinafter "Liquidation Act"). On May 24, 1984, the Commissioner filed a petition in the said Court as United Equity's receiver seeking Declaratory Judgment against Crown Life Insurance Company ("Crown") based upon a reinsurance

agreement Crown had entered into with United Equity in 1983. The Commissioner was joined by the Oklahoma Life and Health Insurance Guaranty Association ("Guaranty Association"), a statutory entity charged with the payment of claims by United Equity's policyholders.

On June 22, 1984 Crown had the action removed to the Federal District Court for the Western District of Oklahoma based on diversity of citizenship. The Commissioner and the Guaranty Association vigorously objected to such removal, arguing that the state court had exclusive jurisdiction under the Liquidation Act and that federal courts had traditionally refused to take jurisdiction over matters involving insurance receiverships. On August 30, 1984 the Court denied Plaintiffs' Motion to Dismiss and accepted jurisdiction. The Plaintiffs renewed their Motion repeatedly throughout the subsequent proceedings but the Court continued to deny it.

The Court at the Pretrial Conference bifurcated the proceedings. The initial stage consisted of a trial to the Court regarding the interpretation of the terms of the Reinsurance Agreement. The factual issues of misrepresentation which had been raised by Crown were temporarily set aside for later trial. This second stage was never reached because the Court's ruling on the interpretation of the contract was dispositive. On May 19, 1986, in a one day proceeding, the Court heard evidence on the interpretation of the rights, duties and obligations of the respective parties to the Reinsurance Agreement and found in favor of Crown. This was reflected in an Order of the Court, dated June 9, 1986.

The Plaintiffs appealed the trial court's order to the Court of Appeals for the Tenth Circuit. In an order entered on September 16, 1988 the Court of Appeals reversed the District Court, holding the court should have abstained and left this matter to the state court (The Circuit Court's opinion was attached to Crown's Petition to this Court at Appendix A and is reported at 857 F.2d 699). Crown immediately filed a petition for rehearing which was denied by the Circuit Court on October 14, 1988. On January 10, 1989 Crown filed a Petition for a Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

Abstention is not waived by a failure to assert it at trial. The doctrine can be raised on appeal by a party or by the court on its own motion. In this case Respondents' failure to raise abstention in the district court is immaterial. The law and evidence clearly mandated abstention under the branch of the doctrine first described by this Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). There is no reason to grant certiorari in this matter.

ARGUMENT AND AUTHORITY

POINT 1: FAILURE TO RAISE ABSTENTION IN THE FEDERAL DISTRICT COURT DOES NOT WAIVE AN APPELLANT'S RIGHT TO ARGUE THE DOCTRINE ON APPEAL.

In the case of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), this Court considered and rejected the applicability of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) to a constitutional challenge of a Wisconsin statute despite the fact that abstention had not been raised in the lower court[1] and was not raised by the state on appeal. The Court followed the *Constantineau* precedent in *Bellotti v. Baird*, 428 U.S. 132 (1976), wherein it stated: "The fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue" (at note 10). The Court in *Bellotti* considered and applied *Pullman* abstention even though it had not been properly asserted below.[2]

More recently, in the case of *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court again relied on *Constantineau* in applying *Pullman* abstention to an action challenging the constitutionality of a city ordinance despite the fact that the Defendant had "given its acquiescence for more than three years to

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[1] See *Constantineau v. Grager*, 302 F.Supp. 861 (E.D. Wisc. 1969)

[2] See *Baird v. Bellotti*, 393 F.Supp. 847 (D. Mass. 1975).

federal adjudication of the merits. . ."[3] While the Court termed the failure to assert the argument below "remarkable", it concluded, "These circumstances undercut the force of the City's argument, but do not bar us from considering it." (at note 16).

The Circuit Courts have also held that abstention may be raised for the first time on appeal, *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983), *A.F.A. Distributing Co. Inc. v. Pearl Brewing Co.*, 470 F.2d 1210 (4th Cir. 1973), *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3rd Cir. 1969), *Cert. den.* 397 U.S. 948. The failure to raise abstention at the district court level clearly does not constitute a waiver of a party's right to assert it on appeal[4].

POINT 2: IN THIS CASE ABSTENTION WAS WARRANTED TO PREVENT INTERFERENCE BY THE FEDERAL COURT IN OKLAHOMA'S STATUTORY INSURANCE INSOLVENCY PROCEDURE.

The Uniform Insurer Liquidation Act provides Oklahoma with a coherent and comprehensive procedure for liquidating insolvent insurance companies. The Act provides a forum for the adjudication of all disputes involving the liquidation in the Oklahoma District Court of Oklahoma County. (36 O.S. §1901). Such a well-organized regulatory scheme coupled with a thorough judicial review in the state courts as well as Oklahoma's strong interest in protecting policyholders, combined to mandate abstention by the district court under this Court's holding in *Burford v. Sun Oil Co.*, supra. This mandate was reinforced by the express federal policy of non interference with insurance

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[3] In the instant action there has been no such acquiescence. See Point 3, infra.

[4] There is in fact no requirement that the issue even be raised by a party at all as the court may do so **sua sponte**. *Wisconsin v. Constantineau*, supra. See for example: *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) wherein the district courts abstained on their own motions. See generally Wright, Miller, and Cooper, *Federal Practice and Procedure* 17A §4245.

matters embodied in the McCarran-Ferguson Act (15 U.S.C. §1011 et seq.)[5] and the traditional policy of non interference by the federal courts with matters affecting insurance receiverships.[6]

Federal Courts have almost universally found *Burford* to mandate abstention in cases involving matters which pertain to insurance insolvency proceedings. Decisions holding that abstention is proper include: *Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co.*, 864 F.2d 1033 (3rd Cir. 1988) (The court reversed as an abuse of discretion the district court's decision not to abstain in an action to recover against an insolvent insurer); *Corcoran v. Ardra Insurance Co. Ltd.*, 842 F.2d 31 (2nd Cir. 1988) (The court sustained the district court's decision to abstain in an action by the New York Superintendent of Insurance, as receiver for an insolvent insurer, to recover reinsurance proceeds from a foreign reinsurer)[7]; *Law Enforcement Insurance Co., Ltd. v. Corcoran*, 807 F.2d 38 (2nd Cir. 1986), *cert. den.* 481 U.S. 1017 (The court sustained, based on *Burford*, the district court's decision to abstain, based on another branch of the abstention doctrine, from an action on reinsurance

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[5] The Act reads in part as follows:

> § 1011. Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest. . .
>
> § 1012. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by a State for the purpose of regulating the business of insurance. . .

[6] See e.g.: *Pennsylvania General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); *United States v. Bank of New York and Trust Co.*, 296 U.S. 463 (1936); *Motlow v. Southern Holding and Securities Corp.*, 95 F.2d 721 (8th Cir. 1938), Cert. den. 305 U.S. 609; *Blackhawk Heating and Plumbing Co. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976);

[7] The district court's decision is reported at *Corcoran v. Ardra Insurance Co. Ltd.*, 657 F.Supp. 1223 (S.D.N.Y. 1987).

policies issued by insolvent insurer)[5]; *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982) (The court upheld the district court's decision to abstain in an indemnity claim against an insolvent insurer); *Levy v. Lewis*, 635 F.2d 960 (2nd Cir. 1980) (The court sustained the district court's dismissal for failure to state a claim in an action under ERISA against insolvent insurer. Instead of deciding on the merits, the circuit court held abstention was proper.); *Cummings Wholesale Electric Company Inc. v. Home Owners Insurance Co.*, 492 F.2d 268 (7th Cir. 1974), *cert. den.* 419 U.S. 833 (The court upheld a dismissal of an action by holders of a surety bond issued by an insolvent insurer); *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 672 F.Supp. 1 (D.D.C. 1986), *aff'd* 784 F.2d 1131 (The court abstained from an action involving an indemnity claim against an insolvent insurer); *Aims Enterprises, Inc. v. Muir*, 609 F.Supp. 257 (E.C. Pa. 1985) (The court abstained in an action by the Delaware Insurance Commissioner as receiver for an insolvent insurer to recover assets held by the Pennsylvania Insurance Commissioner); *Metropolitan Life Insurance Co. v. Board of Directors* 572 F.Supp. 460 (W.D. Wisc. 1983) (The court abstained in a declaratory judgment action against a guaranty association by an assessed member insurer in connection with the insolvency of another insurer); *Matter of All-Star Insurance Corporation*, 484 F.Supp. 623 (E.D. Wisc. 1980) (The court remanded to state court an action to collect a debt by the receiver of an insolvent insurance company which had been removed by the Defendants); *Mathias v. Lennon*, 474 F.Supp. 949 (S.D.N.Y. 1979) (The Court abstained in an action by the Illinois Director of Insurance against the rehabilitator of an insolvent New York insurer).

The only cases in which federal courts have addressed the issue and refused to abstain have been those dealing with exclusive federal remedies. Courts refusing to apply abstention include: *Old Security Life Insurance Company v. Continental Illinois National Bank and Trust Co. of Chicago*, 740 F.2d 1384 (7th Cir. 1984) (Involving claims under ERISA). *Central States,*

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[5] The district court's decision is reported at *Law Enforcement Insurance Co., Ltd. v. Corcoran*, 666 F.Supp. 271 (S.D.N.Y., 1986).

Southeast-Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Company, 600 F.2d 677 (7th Cir. 1979) (same). *Stoller v. Baldwin United Corp.*, (S.D. Ohio, Sept. 19, 1984) **Fed. Sec. L. Rep.**, (CCH) 1984 Transfer Binder, Paragraph 91,678, pg. 99,422 (Involving claims under 1934 Securities and Exchange Act); *In re Texas Turn-Key Operators, Inc.*, 70 BR 193 (Banker S.D. Tx, 1986) (Interpleader action involving a debtor in bankruptcy.) Because the instant case involves no federal remedies, these cases have no applicability.

The Uniform Insurer Liquidation Act provides a complex administrative and judicial system for liquidating an insolvent insurer. There is an express federal policy of non interference reflected in the McCarran-Ferguson Act. Therefore, abstention under *Burford v. Sun Oil Co.*, was clearly appropriate in this action. There is no argument to the contrary and indeed Crown has advanced none.

The Court of Appeals stated the matter succinctly in its opinion as follows:

> Allowing the district court to exercise jurisdiction in this case would disrupt the ability of the state officers of Oklahoma in conjunction with the Oklahoma County District Court to devise and efficiently operate a complex system of administrative and judicial interrelationships which makes up the statutory scheme for liquidating insolvent insurers in Oklahoma. (857 F.2d at 706)

POINT 3: THE FACT THAT RESPONDENTS DID NOT RAISE THE ISSUE OF ABSTENTION IN THIS ACTION UNTIL THE APPELLATE LEVEL IS IMMATERIAL.

As discussed above (see Point 1) failure to raise abstention at the district court level does not necessarily bar its consideration on appeal. The Petitioner asserts however that Respondents' failure to raise the issue at trial amounted to a waiver. This is simply not the case.

In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) this Court held that a state may waive abstention under the line of cases following *Younger v. Harris*, 401 U.S. 37 (1971) by voluntarily choosing to submit itself to a federal forum. Respondents in this action made no such choice. They vigorously resisted the removal of the action from the state court and hotly disputed the issue of the federal court's jurisdiction below.[9]

Moreover, this case involves abstention under *Burford*, not under *Younger*. *Younger* abstention is applicable where "vital state interests" are concerned and there is an ongoing state proceeding with the opportunity to present constitutional challenges. *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982)[10]. *Burford* abstention on the other hand is only appropriate when: "[T]he exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976).

Burford abstention is thus more limited in its application. Abstention under *Younger* is grounded on general concerns of federalism.[11] *Burford* abstention is based on the very specific need

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[9] The Court of Appeals case noted in its opinion "the relevance of many of the jurisdictional arguments raised below to the abstention issue" (at Note 8). Indeed the issues involved are extremely similar as both arguments turn on fact that the federal court was interfering with Oklahoma's liquidation scheme by assuming jurisdiction over this action.

[10] Some federal district courts have applied *Younger* as well as *Burford* abstention to actions involving insolvent insurers. See e.g. *Aims Enterprises Inc. v. Muir*, supra; *Metropolitan Life Insurance Co. v. Board of Directors*, supra; *Matthias v. Lennon*, supra. No circuit court appears to have followed suit.

[11] In fact, Justice Black in his opinion in *Younger* referred to the doctrine as "Our Federalism", a term which has continued to be applied by some courts and commentators. See generally Wright, Miller and Cooper, *Federal Practice and Procedure*, 17A §4251.

to prevent federal intrusion into complex state regulatory schemes when the mere exercise of jurisdiction by the federal courts would be disruptive. Waiver would obviously seem less appropriate in such situations. As far as can be determined, no court has ever held that abstention under *Burford* can be waived. In this case the Court of Appeals applied abstention under *Burford*, not *Younger* and the concept of voluntary waiver which this Court established in *Hodory* is not relevant here.

In its Petition for Certiorari, Crown relies primarily on two cases from the Court of Appeals for the Seventh Circuit; *Serpas v. Schmidt*, 827 F.2d 23, (7th Cir. 1987) and *Mazanec v. North Judson-San Pierre School Corporation*, 763 F.2d 845, (7th Cir. 1985). These cases relate to the presumption against abstention in that circuit once a case has gone to trial. They do not apply in this case for several reasons.

In the first place, both of the Seventh Circuit cases involved a willing submission to the federal forum by the defendant state entities.[12] In both cases the states answered complaints filed in federal court without objecting to the court's jurisdiction or seeking abstention until after the trial had been held.[13] This voluntary conduct brings these cases into line with this Court's holding in *Ohio Bureau of Employment Services v. Hodory*, supra, and distinguishes them from the case at bar in which the Respondents strongly resisted the removal of the action to federal court.

In the second place, both of the cases involved *Pullman* abstention. In the case of *Pennzoil v. Texaco*, 481 U.S. 1 at note 9 (1987) this Court noted that *Pullman* and *Younger* abstention involve

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[12] In *Mazanec* the Court noted: "[T]hese state officials were willing (to litigate the case in federal court), until the case was two years old and had been tried . . ." (763 F.2d at 849). In *Serpas* the Court observed: "[T]he defendants are state officials who raised no objection to having the claims against them litigated in Federal Court until this court itself raised the abstention issue." (827 F.2d at 27, nt. 2)

[13] In *Mazanec* abstention was initially asserted but dropped when Plaintiffs filed an amended complaint. (763 F.2d at 847).

similar considerations. Again this brings the Seventh Circuit cases into line with *Hodory* but distinguishes them from the instant case where the court applied abstention under *Burford*. Under *Burford*, a court must consider more than the delay and interests of judicial economy urged by the Petitioner. In this case the mere fact that the federal court accepted jurisdiction constituted interference with the orderly conduct of United Equity's liquidation. While abstention after the district court's one day trial in this action may constitute a waste of judicial resource, this is a small price to pay for preventing federal intrusion into the orderly administration of Oklahoma's liquidation procedure.

Furthermore, *Serpas* and *Mazanec* deal with only a presumption that abstention is not warranted once an action has gone to trial. The presumption is rebuttable. *Mazanec v. North Judson-San Pierre School Corp.*, supra at 847, *Serpas v. Schmidt*, supra at nt. 2. In this case it cannot be disputed that abstention under *Burford* was appropriate (See Point 2). Any presumption against abstaining would be overwhelmingly rebutted by the vast amount of law and evidence supporting it.

Nor is there any conflict, as Petitioner suggests, between the Tenth and Seventh Circuits in this area. The Court of Appeals in this action noted that it had also held abstention was inappropriate when not raised at trial in the case of *New Mexico v. Molydenum Corporation of America*, 570 F.2d 1364 (10th Cir. 1978).[14] It explained however that: "[B]urford abstention is concerned with preventing the disruption of state efforts to establish a coherent policy with respect to a matter of substantial public policy. . . . The policy underlying *Burford* . . . is not affected by a determination on the merits by a federal district court." (857 F.2d at 707). There is no conflict between this holding and the Seventh Circuit cases cited by petitioner. Further, even if a conflict did exist, this case, where abstention is so clearly mandated, would not be a proper vehicle for resolving it.

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[14] Declining to apply abstention under *Colorado River*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition filed herein and refuse to issue a writ of certiorari in this matter.

Respectfully submitted,

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